IN THE

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,

Petitioners,

v.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, filed April 13, 1976, is reported as *Allison v. Blackledge*, 537 F2d 894 (4 Cir 1976), and is printed as Appendix E in the Petition for Certiorari, pp. 23-32.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1), by writ of certiorari sought by a party to a civil case after rendition of judgment. The petition was filed May

22, 1976, within the statutory ninety days from decision in the Court below, April 13, 1976.

QUESTION PRESENTED

I. WHETHER A UNITED STATES DISTRICT COURT HAS THE DISCRETION TO DENY A PRISONER'S HABEAS CORPUS PETITION WITHOUT A HEARING WHEN HIS CLAIM FOR RELIEF IS THAT HIS ATTORNEY PROMISED A LOWER SENTENCE UPON HIS GUILTY PLEA THAN HE RECEIVED, BUT THIS CLAIM IS CONTRADICTED BY A STATE COURT FINDING OF FACT BASED ON PETITIONER'S OWN TESTIMONY AT THE TIME OF HIS PLEA THAT HIS ATTORNEY PROMISED HIM NOTHING FOR IT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

U.S. Constitution, Article XIV:

"No state . . . shall . . . deprive any person of life, liberty or property, without due process of law."

28 USC §2246:

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 USC §2254 (f):

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a

hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectivly set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 USC §2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or

grant a new trial or correct the sentence as may appear appropriate."

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STATEMENT OF THE CASE

A. Procedural History

This case began with the filing of a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, Greensboro, North Carolina on February 15, 1973. In that petition, Gary Darrell Allison made three claims for relief: his attorney had promised him a lesser sentence if he pled guilty than he received when he did so; he was not advised of his right to appeal; and he did not receive a post-conviction hearing. The State responded that his first contention was refuted by his testimony at the time of his plea; that he had no right to advice on an appeal because he pled guilty; and that the absence of a post-conviction hearing was not a ground for relief in habeas corpus. The case was finally dismissed without a hearing on August 16, 1974 for the failure of the petitioner to produce certain affidavits in support of his claim. Allison then appealed to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, and the case was briefed and argued with court-appointed counsel, C. Frank Goldsmith, Esquire, of Marion, North Carolina, appearing on behalf of petitioner. Before the Fourth Circuit, Allison contended the allegation about his sentence stated a claim which if true, would entitle him to relief; he was entitled to a hearing on it; and the direction of the Court to him, during the pendency of the proceedings, to supplement his petition with affidavits was error. The State argued no significant state action was involved in Allison's claim; an adequate state hearing had been held at trial, the results of which could be accepted by the Court; and the Court's action in attempting to obtain affidavits from him was authorized and reasonable. On April 13, 1976, the Court of Appeals ruled in

Allison's favor, holding he was entitled to a hearing and that the District Court acted improperly in seeking affidavits. A writ of certiorari from this Honorable Court was sought by Warden Blackledge and the State of North Carolina on May 27, 1976, and granted on October 4, 1976.

B. Facts Underlying the Question Presented

On January 24, 1972, in the Superior Court of Almance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). At this time, he was represented by counsel, Glenn Pickard, Esquire. Before Judge Blount accepted Allison's plea, he placed Allison under oath and asked him some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions appeared on a form entitled "Transcript of Plea" (App p11, 12) and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison acknowledged, among other things, that he was guilty and that he understood that he could be imprisoned from ten years to life as a result of his plea; and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. At the end of this proceeding, he also stated that he had no further statements or any questions, and signed a form recording the above answers.[1] On the basis of the overall inquiry, a number of findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty one years (App p 14). He did not appeal.

1. Allison's commitment states that he did address the bench at some point, however, the undersigned was informed by the court reporter that this was not transcribed and so its content has never been before any of the courts considering this matter.

Thereafter, Allison began his collateral attack in the courts of the State of North Carolina, and having unsuccessfully exhausted his state remedies there, he applied for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina on or about February 15, 1973. With regard to the issue before this Honorable Court, he alleged that this plea of guilty to the charge of attempted safe robbery was the result of the following episode:

> "The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel." (App p 2, 3)

In reviewing Allison's application, Honorable Eugene A. Gordon, Chief Judge found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea and impliedly Judge Gordon accepted this examination in lieu of a further hearing on the matter. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation by counsel about a sentence. Therefore, he dismissed the application without evidentiary hearing (App p 15). Allison sought a reconsideration, (App p 17) whereupon Magistrate Herman A. Smith then characterized the allegation as one of an "unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit in support of this claim by the witness he had original-

ly mentioned (App p 19-20). Instead of doing this, Allison sent a letter on or about May 13, 1974, saying that his witness was unable to get his statement notarized (App p 25). He was then informed that the superintendent of the prison unit in which his witness was incarcerated was a notary (App p 26). Thereafter, Allison followed this on or about May 17, 1974, saying that his mother had written him that papers had been notarized but were then torn up by the notary (App p 22). This was interpreted by the District Court as suggesting state interference with his right to access to the courts for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness, with that statement to include a recitation of his attempts to get his paper notarized (App p 23). Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release." (App p 24). On August 16, 1974, Judge Gordon again dismissed his application (App p 25, 26). Allison then sent to the court an unsworn statement to which his co-defendant's name was signed, witnessed by three persons without designation, again seeking reconsideration of the judge's second order (App p 28-30). Nothing was said in the statement forwarded about state interference with the witness' access to the courts, and Allison did not send an affidavit from his mother with it. Reconsideration was therefore declined by Judge Gordon who noted in passing that petitioner's pleadings had been notarized (App p 31).

SUMMARY OF ARGUMENT

Allison's plea proceeding was a thorough one, which provided findings of fact that the District Court should have and did use in coming to its decision on whether or not to grant Allison a hearing on his allegation that his lawyer promised him a lower sentence than he received on his plea of guilty. The District Court's tentative decision to re-open the case if there was independent support for Allison's claim was suggested by decisions of this Honorable Court and other courts, and its method of handling the initial showing by affidavit was entirely proper. On the other hand, the Court of Appeals decision reversing the District Court is based on an inconsequential factor. Moreover, the basis of its decision runs counter to general experience, and the decision itself places an undue burden on the government in light of the circumstances alleged, disregards equitable considerations, and overlooks a substantial motivation underlying the filing of petitions. Therefore, the Court of Appeals should be reversed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO HEAR ANEW THE MATTER OF PROMISES FOR ALLISON'S PLEA WHEN HE OFFERED NO SUBSTANTIATION OF HIS CLAIM.

The District Court properly handled Allison's application for the writ when it re-opened his case. Accordingly, the Court of Appeals erred in reversing the District Court and should itself be reversed by this Honorable Court for the reasons which follow.

Allison presented an application to the District Court which alleged his lawyer told him that if he pled guilty, he would receive a sentence of ten years, and that he had been led to believe that this had been cleared with the judge and the solicitor by his lawyer. When the return of the writ was made, however, the transcript of plea showed Allison had sworn under oath at trial that no promises had been made to him by anyone to influence his plea and that he knew he could get as much as life imprisonment on the charge. Therefore, taking the application and the transcript together, Allison's assertion indicated he

had lied at trial. The District Court's reaction to this was to try to have him corroborate his claim before committing trial time to it. Due to the fact that Allison said that the alleged misrepresentation by his lawyer was witnessed, the Court told him to get an affidavit from this witness to attach to his application. The affidavit never came however, and after the Court had been given the run-around three times, it properly dismissed the action.

The District Court's basis for dismissal was the failure of petitioner to substantiate his claim of plea bargaining and its breach, *i.e.*, the failure to tender new evidence to the Court. This was a permissible approach for the District Court to take because, absent such evidence, all the Court had before it was a state court finding from Allison's plea proceeding which belied his claim. This state court finding was properly relied on since such determinations are presumed correct and ordinarily should be utilized by the federal judiciary in deciding habeas corpus cases, 28 USC §2254(d), *Townsend v. Sain*, 372 US 293 (1963), provided the hearing was a reliable one. The reliability of Allison's plea proceeding cannot be faulted. He was represented by counsel at the time he was tried, and the trial judge took great pains to determine that Allison's plea was a constitutionally valid one. In accordance with normal North Carolina procedure, Allison was sworn and first questioned on his mental competency. Then he was queried on his understanding of the charges against him. Next Judge Blount asked him about his understanding of the pleas available and the possible maximum sentence. When it was determined that he wished to plead guilty, Allison was questioned about his guilt, his trial preparedness, whether or not he was pleading on account of promises, and whether his plea was voluntary or coerced. Finally, he was afforded allocution, but evidently declined it at that time. None of Allison's answers to any of the questions indicated there was anything amiss with regard to his plea. Therefore, no additional questions

were asked him to amplify his responses about any of the areas touched upon. Instead, as a result of Allison's sworn testimony, it appeared to Judge Blount that Allison knew he might get as much as life imprisonment and that no one had made him any promises for his plea. Accordingly, the judge concluded the plea was not induced by any promise of leniency, and on the basis of Allison's other sworn testimony, Judge Blount found the plea was entered understandingly and voluntarily. These conclusions covered the necessary matters of mental competence, *Drope v. Missouri*, 420 US 162 (1975); effective assistance of counsel, *McMann v. Richardson*, 397 US 759 (1970), including knowledgeable forfeiture of trial rights, *Boykin v. Alabama*, 395 US 238 (1969); and the absence of any physical or mental mistreatment or threats of same, *Brady v. United States*, 397 US 742 (1970). In addition, these conclusion determined the absence of any plea bargain to be enforced or misrepresentation by counsel to be uncovered. Therefore, because of both the overall completeness of Allison's at-trial hearing and its coverage of the matter in issue here, it provided findings which the District Court should have accepted in lieu of further hearing under *Townsend v. Sain*, *infra*, and which it had to presume correct under 28 USC §2254. Accordingly, its dismissal was justified on this basis, nothing else appearing, even though the District Court did not expressly rely on the findings from the plea proceeding in so many words.

The District Court also utilized authorized procedures in dealing with Allison prior to rightly dismissing his case on the basis above. It exercised its *Townsend*-authorized discretion in handling the matter by seeking out an initial showing of new evidence before reconsidering the merits of the case. This had been previously suggested as a basis for re-hearing by Part III of *Townsend v. Sain*, 372 US 293, 788 (1963), where there was no "inexcusable neglect" and was the factor on which main reliance was placed by this Honorable Court when authorizing a hearing in *Fontaine v. United States*, 411 US

213 1973. The District Court sought the showing by way of affidavit—a suggested preliminary technique in the Fourth Circuit before this case, *Raines v. United States*, 423 F2d 526 (4 Cir 1970); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); and since this case, *Tabory v. United States*, ... F2d ... (75-1081, Sep. 22, 1976); a technique suggested in other circuits as well, *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974); and a technique authorized for taking evidence on the merits of the case under 28 USC §2246. Accordingly, when the new evidence Allison said existed was not forthcoming, and he made suspicious excuses for not producing some indication of it, the reliance the District Court should have placed on state court findings was significantly enhanced, and its decision to again dismiss the case rested on even a firmer ground than before.

The propriety of the District Court's action in both of the above regards is confirmed by a survey of the modern precedents on the problems of granting hearings on allegations of misrepresentation by counsel or broken plea bargains.[2] This history begins with *Machibroda v. United States*, 368 US 487 (1962). In that case, Machibroda had been convicted and sentenced without a Rule 11 inquiry to determine if his plea was freely made and if it was in exchange for any concessions

2. These phrases are two of several which describe sub-groups of cases within the general area of pleas induced by certain expectations. The first group of cases involves a prediction by an attorney as to sentence or other action upon a guilty plea. When this does not pan out, it is generally held not to be a basis for setting a plea aside. An occasional case also deals with pleas induced by predictions by government personnel, with relief being allowed under the "mistake of fact" recission doctrine. Another sub-group of cases involves unfulfilled assurances by counsel that if a plea is made, certain things will come to pass, without the assurance including any mention of the government as having promised them. A fourth group involves alleged unkept assurances by counsel that the government has promised something for his plea. The final group involves alleged unkept assurances made to the defendant personally by the government, with or without the presence of his counsel.

from the government. He later attacked it in a motion accompanied by a nineteen paragraph affidavit, detailing the particulars, persons, places and times involved in the alleged episodes of plea bargaining and coercion. This was dismissed without a hearing in the District Court and its decision was affirmed by the Court of Appeals. However, this Honorable Court reversed on the grounds that 28 USC §2255 required a hearing because the motion, files and records of the case did not "conclusively" show that the prisoner was entitled to no relief. Although the majority opinion described the *Machibroda* case as "marginal" and " not far from the line", the Court was impressed by the fact that the record showed nothing on the matter and the affidavit about it was detailed. The importance of detail and supporting material has recently been re-affirmed by this Honorable Court's decision in *Fontaine v. United States*, 411 US 213 (1973), dealing with a different context—mental competence. In that case, hospital records were tendered in support of Fontaine's claims and showed hospitalization a month following his plea for heroin addiction, and other severe injury and illness. Once again, this Honorable Court held that the 28 USC §2255 standard of conclusiveness was not met when this material was compared with the evidence taken at the Rule 11 plea proceeding (not set out in the opinion). This differs from the ordinary case such as Allison's and this difference has been impressively stated by Judge Clark of the Fifth Circuit, writing for the majority in the *en banc* decision in *Bryan v. United States*, 492 F2d 775 (5 Cir 1974):

> ". . . The record of the plea proceedings in the case at bar reflects that both Bryan and his attorney testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly.[3] No such testimony appeared in the files and records developed in Fon-

3. Allison's case differs from Bryan's in that Allison's lawyer evidently made no representations to the court at trial about the absence of promises.

taine and Machibroda. In neither of these cases had petitioner and his attorney been required to testify in open court as to whether a bargain had been struck. In neither case did explicit denials of plea bargains appear as a part of a duly recorded court proceeding record. To the contrary, not only was the subject of plea bargaining entirely absent from Fontaine's record but also those documents disclosed that he did not even have an attorney. The Machibroda record shows that the only person permitted to speak at the time of his sentencing was the attorney from whom knowledge of the alleged plea bargain had assertedly been withheld.

It is one thing to hold that petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of an unraised fact, but the utterly incredible assertion that all former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself.

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The Supreme Court said that Machibroda was 'not far from the line'. This case is way over it." *Id.* at 780.

Therefore, in light of these precedents, the District Court's disposition was clearly correct.[4]

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4. In addition to Allison's claim, like Bryan's, having been contradicted, an additional factor weighs against a hearing for him that is not present in *Bryan* or most of the other cases which follow. As Allison was a state prisoner, the standard of conclusiveness was inapplicable to the prior proceeding concerning him, since that standard appears only in 28 USC §2255 dealing with federal prisoners, not in 28 USC §2254, dealing with state prisoners. Therefore, prior proceedings concerning Allison are not gauged with the same stringency as those of Bryan and other federal prisoners.

The District Court's decision is also supported by an analysis of post *Machibroda* authority. The majority of cases show heed paid to the salient facts in *Machibroda* and rulings made accordingly. For example, where an allegation of misrepresentation by counsel or a broken plea bargain by government has been made, and there evidently has been no disclaimer of promises at the time of a plea, a hearing has been directed, *Scott v. United States*, 349 F2d 641 (6 Cir 1965); *Del Piano v. United States*, 362 F2d 931 (3 Cir 1966); *Reed v. United States*, 441 F2d 569 (9 Cir 1971); *Shoultz v. Hocker*, 469 F2d 681 (9 Cir 1971) (state case); *United States v. Battle*, 447 F2d 950 (5 Cir 1971); *Micklus v. United States*, 537 F2d 381 (9 Cir 1976), although the aspect of detail in alleging the episode has not been critically dealt with except in the *Scott* and *Micklus* cases. On the other hand, where a misrepresentation by counsel or a broken plea bargain by government is alleged by one who has previously told the court that he has received no promises for his plea, some cases have held that files and records meet the statutory "conclusive" standard on this account alone, *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964); *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *Rosado v. United States*, 510 F2d 1098 (5 Cir 1975). Still other cases have reached the same result on the basis of an at-trial disclaimer of promises without employing a form of the statutory term, conclusiveness, *Lynott v. United States*, 360 F2d 586 (3 Cir 1966); *Alvereze v. United States*, 427 F2d 1150 (5 Cir 1970); *Moody v. United States* 497 F2d 359 (7 Cir 1974); *Frank v. United States*, 501 F2d 173 (5 Cir 1974). Yet another group of cases came to this result in partial reliance on other noteworthy factors as well as the disclaimer of promises, *Olive v. United States*, 327 F2d 646 (6 Cir 1964) (failure to use opportunity to speak plus conclusory allegations); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (failure to speak at previous opportunity plus experience in criminal prosecu-

tions); *Earley v. United States*, 381 F2d 715 (9 Cir 1967) (meticulous overall examination on plea plus conclusory allegation); *United States v. Tweedy*, 419 F2d 192 (9 Cir 1969) (failure to mention complaint when writing the judge three letters); *United States v. Frontero*, 452 F2d 406 (5 Cir 1971) (lawyer's statement inconsistent with claim plus conclusory allegation); *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (lawyer's statement inconsistent with claim); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974) (failure to mention the complaints when writing the judge plus delay of two years in complaining); *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) (use of the words "plea bargain" in examining the accused). The decisions in each of last three groups above support the District Court's dismissal and show that its ultimate disposition of the case was proper.

The District Court's approach, as well as its decision is supported by another group of post *Machibroda* precedents—cases like *Machibroda* and *Fontaine* in which a hearing was ordered. In this group of cases, there has been some independent basis for re-examining the plea proceedings beyond the word of the prisoner. In *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974) and *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971) (state case), the record itself showed the incomplete resolution of the conflicts concerning the existence of plea bargaining. In *Hilliard v. Beto*, 465 F2d 829 (5 Cir 1972) (state case), the record showed a substantial reason to lie in that the judge would not accept a bargained plea and Hilliard faced death if his plea were unaccepted. In *Roberts v. United States*, 486 F2d 980 (5 Cir 1973) and *Dugan v. United States*, 521 F2d 231 (5 Cir 1975), the record was supplemented by substantial corroboration in the form of affidavits, some from apparently reliable third parties. Each of the above, like the intended yield of the District Court's efforts, bears some resemblance to one of the bases for re-hearing set out in *Townsend v. Sain*, 372 US 293 (1963). Accordingly, they demonstrate the propriety of the District Court's dismissal in

the absence of some comparable factor in Allison's case.

The Court of Appeals attached significance to an inference from the allegations in this case that Allison's "no promises" statement was part of a cover-up in which he was told to lie to get his plea accepted. Mention of this factor has been made in other cases, *United States v. Tweedy*, 419 F2d 192 (1969); *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Roberts v. United States*, 486 F2d 980 (5 Cir 1973); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974); *Bass v. United States*, 529 F2d 1374 (4 Cir 1975). However, it adds nothing to the basic contention and should have no significance as the pleading factor. It would be the expected explanation for an allegedly false answer, and the only possible one except for an unreal degree of inattentiveness or reckless disregard. Even with this additional allegation, the claim remains one of either ineffective assistance of counsel or of fundamental unfairness, or both, depending on who supposedly procured the prisoner's perjury; and, like the basic allegation, is belied by the transcript in that it runs counter to the oath. In writing the opinion in *Bryan v. United States*, 492 F2d 775 (1974), Judge Clark pointed out the pitfall involved in using this additional factor as a basis for a hearing:

> "It is one thing to hold that a petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of a unraised fact, but the utterly incredible assertion that all the former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectivly set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 USC §2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or

grant a new trial or correct the sentence as may appear appropriate."

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STATEMENT OF THE CASE

A. Procedural History

This case began with the filing of a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, Greensboro, North Carolina on February 15, 1973. In that petition, Gary Darrell Allison made three claims for relief: his attorney had promised him a lesser sentence if he pled guilty than he received when he did so; he was not advised of his right to appeal; and he did not receive a post-conviction hearing. The State responded that his first contention was refuted by his testimony at the time of his plea; that he had no right to advice on an appeal because he pled guilty; and that the absence of a post-conviction hearing was not a ground for relief in habeas corpus. The case was finally dismissed without a hearing on August 16, 1974 for the failure of the petitioner to produce certain affidavits in support of his claim. Allison then appealed to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, and the case was briefed and argued with court-appointed counsel, C. Frank Goldsmith, Esquire, of Marion, North Carolina, appearing on behalf of petitioner. Before the Fourth Circuit, Allison contended the allegation about his sentence stated a claim which if true, would entitle him to relief; he was entitled to a hearing on it; and the direction of the Court to him, during the pendency of the proceedings, to supplement his petition with affidavits was error. The State argued no significant state action was involved in Allison's claim; an adequate state hearing had been held at trial, the results of which could be accepted by the Court; and the Court's action in attempting to obtain affidavits from him was authorized and reasonable. On April 13, 1976, the Court of Appeals ruled in

Allison's favor, holding he was entitled to a hearing and that the District Court acted improperly in seeking affidavits. A writ of certiorari from this Honorable Court was sought by Warden Blackledge and the State of North Carolina on May 27, 1976, and granted on October 4, 1976.

B. Facts Underlying the Question Presented

On January 24, 1972, in the Superior Court of Almance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). At this time, he was represented by counsel, Glenn Pickard, Esquire. Before Judge Blount accepted Allison's plea, he placed Allison under oath and asked him some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions appeared on a form entitled "Transcript of Plea" (App p11, 12) and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison acknowledged, among other things, that he was guilty and that he understood that he could be imprisoned from ten years to life as a result of his plea; and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. At the end of this proceeding, he also stated that he had no further statements or any questions, and signed a form recording the above answers.[1] On the basis of the overall inquiry, a number of findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty one years (App p 14). He did not appeal.

1. Allison's commitment states that he did address the bench at some point, however, the undersigned was informed by the court reporter that this was not transcribed and so its content has never been before any of the courts considering this matter.

Thereafter, Allison began his collateral attack in the courts of the State of North Carolina, and having unsuccessfully exhausted his state remedies there, he applied for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina on or about February 15, 1973. With regard to the issue before this Honorable Court, he alleged that this plea of guilty to the charge of attempted safe robbery was the result of the following episode:

> "The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel." (App p 2, 3)

In reviewing Allison's application, Honorable Eugene A. Gordon, Chief Judge found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea and impliedly Judge Gordon accepted this examination in lieu of a further hearing on the matter. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation by counsel about a sentence. Therefore, he dismissed the application without evidentiary hearing (App p 15). Allison sought a reconsideration, (App p 17) whereupon Magistrate Herman A. Smith then characterized the allegation as one of an "unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit in support of this claim by the witness he had original-

ly mentioned (App p 19-20). Instead of doing this, Allison sent a letter on or about May 13, 1974, saying that his witness was unable to get his statement notarized (App p 25). He was then informed that the superintendent of the prison unit in which his witness was incarcerated was a notary (App p 26). Thereafter, Allison followed this on or about May 17, 1974, saying that his mother had written him that papers had been notarized but were then torn up by the notary (App p 22). This was interpreted by the District Court as suggesting state interference with his right to access to the courts for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness, with that statement to include a recitation of his attempts to get his paper notarized (App p 23). Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release." (App p 24). On August 16, 1974, Judge Gordon again dismissed his application (App p 25, 26). Allison then sent to the court an unsworn statement to which his co-defendant's name was signed, witnessed by three persons without designation, again seeking reconsideration of the judge's second order (App p 28-30). Nothing was said in the statement forwarded about state interference with the witness' access to the courts, and Allison did not send an affidavit from his mother with it. Reconsideration was therefore declined by Judge Gordon who noted in passing that petitioner's pleadings had been notarized (App p 31).

SUMMARY OF ARGUMENT

Allison's plea proceeding was a thorough one, which provided findings of fact that the District Court should have and did use in coming to its decision on whether or not to grant Allison a hearing on his allegation that his lawyer promised him a lower sentence than he received on his plea of guilty. The District Court's tentative decision to re-open the case if there was independent support for Allison's claim was suggested by decisions of this Honorable Court and other courts, and its method of handling the initial showing by affidavit was entirely proper. On the other hand, the Court of Appeals decision reversing the District Court is based on an inconsequential factor. Moreover, the basis of its decision runs counter to general experience, and the decision itself places an undue burden on the government in light of the circumstances alleged, disregards equitable considerations, and overlooks a substantial motivation underlying the filing of petitions. Therefore, the Court of Appeals should be reversed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO HEAR ANEW THE MATTER OF PROMISES FOR ALLISON'S PLEA WHEN HE OFFERED NO SUBSTANTIATION OF HIS CLAIM.

The District Court properly handled Allison's application for the writ when it re-opened his case. Accordingly, the Court of Appeals erred in reversing the District Court and should itself be reversed by this Honorable Court for the reasons which follow.

Allison presented an application to the District Court which alleged his lawyer told him that if he pled guilty, he would receive a sentence of ten years, and that he had been led to believe that this had been cleared with the judge and the solicitor by his lawyer. When the return of the writ was made, however, the transcript of plea showed Allison had sworn under oath at trial that no promises had been made to him by anyone to influence his plea and that he knew he could get as much as life imprisonment on the charge. Therefore, taking the application and the transcript together, Allison's assertion indicated he

had lied at trial. The District Court's reaction to this was to try to have him corroborate his claim before committing trial time to it. Due to the fact that Allison said that the alleged misrepresentation by his lawyer was witnessed, the Court told him to get an affidavit from this witness to attach to his application. The affidavit never came however, and after the Court had been given the run-around three times, it properly dismissed the action.

The District Court's basis for dismissal was the failure of petitioner to substantiate his claim of plea bargaining and its breach, *i.e.*, the failure to tender new evidence to the Court. This was a permissible approach for the District Court to take because, absent such evidence, all the Court had before it was a state court finding from Allison's plea proceeding which belied his claim. This state court finding was properly relied on since such determinations are presumed correct and ordinarily should be utilized by the federal judiciary in deciding habeas corpus cases, 28 USC §2254(d), *Townsend v. Sain*, 372 US 293 (1963), provided the hearing was a reliable one. The reliability of Allison's plea proceeding cannot be faulted. He was represented by counsel at the time he was tried, and the trial judge took great pains to determine that Allison's plea was a constitutionally valid one. In accordance with normal North Carolina procedure, Allison was sworn and first questioned on his mental competency. Then he was queried on his understanding of the charges against him. Next Judge Blount asked him about his understanding of the pleas available and the possible maximum sentence. When it was determined that he wished to plead guilty, Allison was questioned about his guilt, his trial preparedness, whether or not he was pleading on account of promises, and whether his plea was voluntary or coerced. Finally, he was afforded allocution, but evidently declined it at that time. None of Allison's answers to any of the questions indicated there was anything amiss with regard to his plea. Therefore, no additional questions

were asked him to amplify his responses about any of the areas touched upon. Instead, as a result of Allison's sworn testimony, it appeared to Judge Blount that Allison knew he might get as much as life imprisonment and that no one had made him any promises for his plea. Accordingly, the judge concluded the plea was not induced by any promise of leniency, and on the basis of Allison's other sworn testimony, Judge Blount found the plea was entered understandingly and voluntarily. These conclusions covered the necessary matters of mental competence, *Drope v. Missouri*, 420 US 162 (1975); effective assistance of counsel, *McMann v. Richardson*, 397 US 759 (1970), including knowledgeable forfeiture of trial rights, *Boykin v. Alabama*, 395 US 238 (1969); and the absence of any physical or mental mistreatment or threats of same, *Brady v. United States*, 397 US 742 (1970). In addition, these conclusion determined the absence of any plea bargain to be enforced or misrepresentation by counsel to be uncovered. Therefore, because of both the overall completeness of Allison's at-trial hearing and its coverage of the matter in issue here, it provided findings which the District Court should have accepted in lieu of further hearing under *Townsend v. Sain, infra*, and which it had to presume correct under 28 USC §2254. Accordingly, its dismissal was justified on this basis, nothing else appearing, even though the District Court did not expressly rely on the findings from the plea proceeding in so many words.

The District Court also utilized authorized procedures in dealing with Allison prior to rightly dismissing his case on the basis above. It exercised its *Townsend*-authorized discretion in handling the matter by seeking out an initial showing of new evidence before reconsidering the merits of the case. This had been previously suggested as a basis for re-hearing by Part III of *Townsend v. Sain*, 372 US 293, 788 (1963), where there was no "inexcusable neglect" and was the factor on which main reliance was placed by this Honorable Court when authorizing a hearing in *Fontaine v. United States*, 411 US

213 1973. The District Court sought the showing by way of affidavit—a suggested preliminary technique in the Fourth Circuit before this case, *Raines v. United States*, 423 F2d 526 (4 Cir 1970); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); and since this case, *Tabory v. United States*, ___ F2d ___ (75-1081, Sep. 22, 1976); a technique suggested in other circuits as well, *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974); and a technique authorized for taking evidence on the merits of the case under 28 USC §2246. Accordingly, when the new evidence Allison said existed was not forthcoming, and he made suspicious excuses for not producing some indication of it, the reliance the District Court should have placed on state court findings was significantly enhanced, and its decision to again dismiss the case rested on even a firmer ground than before.

The propriety of the District Court's action in both of the above regards is confirmed by a survey of the modern precedents on the problems of granting hearings on allegations of misrepresentation by counsel or broken plea bargains.[2] This history begins with *Machibroda v. United States*, 368 US 487 (1962). In that case, Machibroda had been convicted and sentenced without a Rule 11 inquiry to determine if his plea was freely made and if it was in exchange for any concessions

2. These phrases are two of several which describe sub-groups of cases within the general area of pleas induced by certain expectations. The first group of cases involves a prediction by an attorney as to sentence or other action upon a guilty plea. When this does not pan out, it is generally held not to be a basis for setting a plea aside. An occasional case also deals with pleas induced by predictions by government personnel, with relief being allowed under the "mistake of fact" recission doctrine. Another sub-group of cases involves unfulfilled assurances by counsel that if a plea is made, certain things will come to pass, without the assurance including any mention of the government as having promised them. A fourth group involves alleged unkept assurances by counsel that the government has promised something for his plea. The final group involves alleged unkept assurances made to the defendant personally by the government, with or without the presence of his counsel.

from the government. He later attacked it in a motion accompanied by a nineteen paragraph affidavit, detailing the particulars, persons, places and times involved in the alleged episodes of plea bargaining and coercion. This was dismissed without a hearing in the District Court and its decision was affirmed by the Court of Appeals. However, this Honorable Court reversed on the grounds that 28 USC §2255 required a hearing because the motion, files and records of the case did not "conclusively" show that the prisoner was entitled to no relief. Although the majority opinion described the *Machibroda* case as "marginal" and " not far from the line", the Court was impressed by the fact that the record showed nothing on the matter and the affidavit about it was detailed. The importance of detail and supporting material has recently been re-affirmed by this Honorable Court's decision in *Fontaine v. United States*, 411 US 213 (1973), dealing with a different context—mental competence. In that case, hospital records were tendered in support of Fontaine's claims and showed hospitalization a month following his plea for heroin addiction, and other severe injury and illness. Once again, this Honorable Court held that the 28 USC §2255 standard of conclusiveness was not met when this material was compared with the evidence taken at the Rule 11 plea proceeding (not set out in the opinion). This differs from the ordinary case such as Allison's and this difference has been impressively stated by Judge Clark of the Fifth Circuit, writing for the majority in the *en banc* decision in *Bryan v. United States*, 492 F2d 775 (5 Cir 1974):

> ". . . The record of the plea proceedings in the case at bar reflects that both Bryan and his attorney testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly.[3] No such testimony appeared in the files and records developed in Fon-

3. Allison's case differs from Bryan's in that Allison's lawyer evidently made no representations to the court at trial about the absence of promises.

taine and Machibroda. In neither of these cases had petitioner and his attorney been required to testify in open court as to whether a bargain had been struck. In neither case did explicit denials of plea bargains appear as a part of a duly recorded court proceeding record. To the contrary, not only was the subject of plea bargaining entirely absent from Fontaine's record but also those documents disclosed that he did not even have an attorney. The Machibroda record shows that the only person permitted to speak at the time of his sentencing was the attorney from whom knowledge of the alleged plea bargain had assertedly been withheld.

It is one thing to hold that petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of an unraised fact, but the utterly incredible assertion that all former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself.

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The Supreme Court said that Machibroda was 'not far from the line'. This case is way over it." *Id.* at 780.

Therefore, in light of these precedents, the District Court's disposition was clearly correct.[4]

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4. In addition to Allison's claim, like Bryan's, having been contradicted, an additional factor weighs against a hearing for him that is not present in *Bryan* or most of the other cases which follow. As Allison was a state prisoner, the standard of conclusiveness was inapplicable to the prior proceeding concerning him, since that standard appears only in 28 USC §2255 dealing with federal prisoners, not in 28 USC §2254, dealing with state prisoners. Therefore, prior proceedings concerning Allison are not gauged with the same stringency as those of Bryan and other federal prisoners.

The District Court's decision is also supported by an analysis of post *Machibroda* authority. The majority of cases show heed paid to the salient facts in *Machibroda* and rulings made accordingly. For example, where an allegation of misrepresentation by counsel or a broken plea bargain by government has been made, and there evidently has been no disclaimer of promises at the time of a plea, a hearing has been directed, *Scott v. United States*, 349 F2d 641 (6 Cir 1965); *Del Piano v. United States*, 362 F2d 931 (3 Cir 1966); *Reed v. United States*, 441 F2d 569 (9 Cir 1971); *Shoultz v. Hocker*, 469 F2d 681 (9 Cir 1971) (state case); *United States v. Battle*, 447 F2d 950 (5 Cir 1971); *Micklus v. United States*, 537 F2d 381 (9 Cir 1976), although the aspect of detail in alleging the episode has not been critically dealt with except in the *Scott* and *Micklus* cases. On the other hand, where a misrepresentation by counsel or a broken plea bargain by government is alleged by one who has previously told the court that he has received no promises for his plea, some cases have held that files and records meet the statutory "conclusive" standard on this account alone, *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964); *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *Rosado v. United States*, 510 F2d 1098 (5 Cir 1975). Still other cases have reached the same result on the basis of an at-trial disclaimer of promises without employing a form of the statutory term, conclusiveness, *Lynott v. United States*, 360 F2d 586 (3 Cir 1966); *Alvereze v. United States*, 427 F2d 1150 (5 Cir 1970); *Moody v. United States* 497 F2d 359 (7 Cir 1974); *Frank v. United States*, 501 F2d 173 (5 Cir 1974). Yet another group of cases came to this result in partial reliance on other noteworthy factors as well as the disclaimer of promises, *Olive v. United States*, 327 F2d 646 (6 Cir 1964) (failure to use opportunity to speak plus conclusory allegations); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (failure to speak at previous opportunity plus experience in criminal prosecu-

tions); *Earley v. United States*, 381 F2d 715 (9 Cir 1967) (meticulous overall examination on plea plus conclusory allegation); *United States v. Tweedy*, 419 F2d 192 (9 Cir 1969) (failure to mention complaint when writing the judge three letters); *United States v. Frontero*, 452 F2d 406-(5 Cir 1971) (lawyer's statement inconsistent with claim plus conclusory allegation); *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (lawyer's statement inconsistent with claim); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974) (failure to mention the complaints when writing the judge plus delay of two years in complaining); *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) (use of the words "plea bargain" in examining the accused). The decisions in each of last three groups above support the District Court's dismissal and show that its ultimate disposition of the case was proper.

The District Court's approach, as well as its decision is supported by another group of post *Machibroda* precedents—cases like *Machibroda* and *Fontaine* in which a hearing was ordered. In this group of cases, there has been some independent basis for re-examining the plea proceedings beyond the word of the prisoner. In *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974) and *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971) (state case), the record itself showed the incomplete resolution of the conflicts concerning the existence of plea bargaining. In *Hilliard v. Beto*, 465 F2d 829 (5 Cir 1972) (state case), the record showed a substantial reason to lie in that the judge would not accept a bargained plea and Hilliard faced death if his plea were unaccepted. In *Roberts v. United States*, 486 F2d 980 (5 Cir 1973) and *Dugan v. United States*, 521 F2d 231 (5 Cir 1975), the record was supplemented by substantial corroboration in the form of affidavits, some from apparently reliable third parties. Each of the above, like the intended yield of the District Court's efforts, bears some resemblance to one of the bases for re-hearing set out in *Townsend v. Sain*, 372 US 293 (1963). Accordingly, they demonstrate the propriety of the District Court's dismissal in

the absence of some comparable factor in Allison's case.

The Court of Appeals attached significance to an inference from the allegations in this case that Allison's "no promises" statement was part of a cover-up in which he was told to lie to get his plea accepted. Mention of this factor has been made in other cases, *United States v. Tweedy*, 419 F2d 192 (1969); *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Roberts v. United States*, 486 F2d 980 (5 Cir 1973); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974); *Bass v. United States*, 529 F2d 1374 (4 Cir 1975). However, it adds nothing to the basic contention and should have no significance as the pleading factor. It would be the expected explanation for an allegedly false answer, and the only possible one except for an unreal degree of inattentiveness or reckless disregard. Even with this additional allegation, the claim remains one of either ineffective assistance of counsel or of fundamental unfairness, or both, depending on who supposedly procured the prisoner's perjury; and, like the basic allegation, is belied by the transcript in that it runs counter to the oath. In writing the opinion in *Bryan v. United States*, 492 F2d 775 (1974), Judge Clark pointed out the pitfall involved in using this additional factor as a basis for a hearing:

> "It is one thing to hold that a petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of a unraised fact, but the utterly incredible assertion that all the former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality

> that decisional law must have to maintain its credence. Indeed, the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceding hearing subborned false testimony from him or his lawyer or that the judge played false in the performance of his duties." *Id.* at 780.

Therefore, in light of the above, this additional factor should have no impact as a matter of pleading and does not provide a basis for reversing the District Court's approach in this matter.[5]

This District Court's approach, and the precedents above in accordance with it, are supported by a number of sound reasons. These include the low probability of such claims being truthful; the inability to determine if this is an actionable complaint on the basis of the allegations made by Allison; the possible damage done to the equitable underpinnings of habeas corpus by permitting such claims as this to be made; and the fact that a hearing alone, not freedom, is often the real relief

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5. Some of the cases in the above paragraph are part of a larger group which do not support the District Court's approach. One subgroup flatly holds that disclaimers or promises are only "evidential — not conclusive", and rely mostly on this view in ordering a remand. *United States ex. rel. McGrath v. LaVallee*, 319 308 (2 Cir 1963) (state case); *Trotter v. United States*, 359 F2d 419 (2 Cir 1966); *Jones v. United States*, 384 F2d 916 (9 Cir 1967); *United States v. McCarthy*, 433 F2d 591 (1 Cir 1970); Other cases evidently assume this proposition but do not articulate it when ordering a remand, *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1976) (state case); *Mayes v. Pickett*, 537 F2d 1080 (9 Cir 1976); *McAleney v. United States*, 539 F2d 282 (1 Cir 1976). Other cases remand for preliminary action such as a response by the government on the basis of this view without articulating it. *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974). The District Court properly disregarded such decisions as these.

sought by such petitions. Each standing alone would suffice as a good reason for decision. All together, they make the District Court's resolution a compelling one.

The first reason—low probability of truthfulness—cannot be gainsaid. This is an elementary fact of life in habeas practice because of the low percent of prisoner wins overall. Beyond this generalization, however, the low probability of truthfulness on this particular type claim is demonstrated by the near unanimous recorded reaction of the federal trial judiciary to it, as shown by the decisions previously cited in this brief. In every one dealing with this type of claim, the District Court Judges denied a hearing in the first instance. In some cases, they did not even ask the government to answer. This single stance by the trial judiciary is an impressive reason by itself for this Honorable Court to endorse the District Court's resolution. However, it does not have to stand by itself as a reason for action by this Honorable Court. It is complimented by the fact that those appellate courts which have reversed the District Courts know the same thing to be true. In *Reed v. United States*, 441 F2d 569 (9 Cir 1971), the court opined that the hearing it ordered might well be "an exercise in futility"; in *United States v. Simpson*, 436 F2d 162 (DC Cir 1970), the plea transcript contradicting the claim was described as being of "high significance" in testing the merits of the claim; in *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974), the prisoner was described as facing a "formidable barrier" and a "herculean burden" in this type of case. Even in the Fourth Circuit, Judge Craven who authored *Walters v. Harris*, 460 F2d 988 (4 Cir 1972), which engendered the decision in Allison's case, recently expressed the following thoughts in another context:

> "We think that all but very few lawyers take seriously their obligation as officers of the court and their proper role in the administration of justice. We think the probability of improper counselling, ie, to lie or evade or distort the truth, is negligible in most cases.

> . . . [W]e think that effective improper coaching is not so easily accomplished as some would suppose. Directors of drama spend hours, not minutes, teaching the correct inflection and demeanor to an accomplished actor to achieve a convincing performance. We think the occasional unethical lawyer is not so expert and his client not so adapt in the art of deceit.", *United States v. Allen*, __ F2d (75-1295) (4 Cir 1976).

In light of the uniform stance of the trial judiciary and expressions by the appellate judiciary such as the above, the District Court's resolution in this case was entirely proper.

The second reason is an especially important one in view of today's crowded federal dockets. Government personnel are not implicated through Allison's personal knowledge and for all that appears, he may asking the Court to penalize the government for perjury and conspiracy in which it played no part. If this developed as the case, it would be questionable whether his complaint would be actionable due to the minimal state action involved (maintaining the conviction through denial of a post-conviction remedy). Along these lines, one court has recently remarked that "[i]t is a strange legal concept which permits a convict to escape the consequences of his sentence by alleging any legal conspiracy between himself and his lawyer, which brazenly contradicts the solemn and commemorative record made by the judge, counsel and the convict at the Rule 11 hearing", *Mayes v. Pickett*, 537 F2d 1080, 1083 (9 Cir 1976). Therefore, in view of the absence of causitive state action, and the additional facts that guilt or innocence is not ordinarily involved in this type of claim and the prisoner has other recourse against his lawyer, a doctrine of non-review might well be applied to this type of claim. Transferring these factors to the pleading stage, the higher threshhold requirement aids the court in making the determination on this before it commits trial time to it. If it decides to deny relief, a savings is obtained by not having a hearing. Therefore, this factor strongly supports the District Court's resolution.

The third reason is an alternative to the above. It is the damage done to equitable principles if relief is given despite the absence of government fault. As noted in *Fay v. Noia*, 372 US 391 (1963), the writ is historically governed by these principles, and a new defense analogous to the "clean hands" doctrine—deliberate by-pass of state remedies—was established in that case. Both deliberate by-pass and equitable estoppel are raised by allegations such as Allison's where the state is not authoritatively implicated in the misrepresentation. The former may occur because Allison subverted his own plea proceeding. The latter may occur because he lied to obtain a benefit for himself and this was acted on by the state with the prejudice to it of wasted time and money in the plea proceeding and possible future prejudice upon attempting a belated re-trial of the case. At the least, the presence of what would be defenses in the ordinary case should raise the threshhold for hearings so that the inequity above is not compounded by the expenditure of more trial time on claims sought only to be proved from a different side of the same mouth. The savings here provides some offset to the time and money which may have to be expended where relief is granted, to bring the prisoner and his lawyer to justice on account of their conspiracy. Accordingly, this factor demonstrates the propriety of the District Court action.

The last reason a higher threshhold should be required is the fact that the easy availability of a hearing alone is a sufficient inducement to cause many such writs to be filed. The reason for this is that the ordinary looms large in the scheme of things for men whose daily life is the routine of incarceration and isolation. The things that go with obtaining a hearing such as an extra shower, a chance to change into civilian clothes, an automobile ride, the appearance of new faces, and the absence from the institutional environment, mean way more to a prisoner than they would to the man on the street. Given this situation, the outcome on the merits is frequently secondary as a motive for filing a petition. This has been recognized before—

Price v. Johnson, 334 US 266 (1948); *Machibroda v. United States*, 368 US 487 (1962) (dissent of Mr. Justice Clark)—and it is not just speculation. Already, three circuits have remarked on the volume of this type of petition, *Bryan v. United States*, 492 F2d 775 (5 Cir 1974); *Paradiso v. United States*, 482 F2d 409 (3 Cir 1973); *Moody v. United States*, 497 F2d 359 (7 Cir 1974).[6] Accordingly, this impressive reason also suggests that the result reached by the District Court was the correct one.

CONCLUSION

In *Boykin v. Alabama*, 395 US 238 (1969), this Honorable Court constitutionalized the necessity of an examination of the accused prior to accepting his guilty plea. This was done in hopes that it would create a record "adequate for any review that may later be sought and . . . [to forstall] the spin-off of collateral proceedings" and accordingly, in *Fontaine v. United States*, 411 US 213 (1973), this Honorable Court implied that statements made at the above proceeding ordinarily could not be repudiated. The Court of Appeals' treatment of North Carolina's plea proceeding is wholly inconsistent with both of these cases. Therefore, its reasoning should be corrected and its decision reversed, and this is the relief to which your petitioners believe themselves entitled.

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6. North Carolina is not in a floodgates situation on this type of claim at this time. However, as noted in the petition for certiorari, its potential exposure is huge. There were 116,000 pleas taken under the form of inquiry condemned by the Fourth Circuit in this case. This covers the period of from 1967 through 1973. In early 1974, a different form was substituted, but older forms were not discarded, but instead used until exhausted. Therefore, an unknown part of the 50,000 plus pleas taken since 1974 are also voidable. Needless to say, the sentences in the worst of the above cases have not been served, and even those that have been served retain continued viability for habeas review purposes in the context of being used for later impeachment, for sentencing purposes and other collateral consequences under such decisions of this Court as *Loper v. Beto*, 405 US 473 (1972); *United States v. Tucker*, 404 US 443 (1972); and *Carafas v. LaVallee*, 391 US 234 (1968).

Respectfully submitted,

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